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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming	)	CS Docket No. 99-230

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COMMENTS OF BELLSOUTH CORPORATION, BELLSOUTH INTERACTIVE MEDIA SERVICES, INC. AND BELLSOUTH WIRELESS CABLE, INC.

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August 6, 1999

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EXECUTIVE SUMMARY

BellSouth Corporation and its subsidiaries, BellSouth Interactive Media Services, Inc. and BellSouth Wireless Cable, Inc. (hereinafter referred to collectively as "BellSouth") remains concerned that significant regulatory obstacles exist which have prevented BellSouth and others from competing on an equal footing with incumbent cable operators. This situation is inconsistent with Congress' intent in enacting the Cable Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"). The objectives of the 1992 Cable Act have yet to be realized as BellSouth and other multichannel video programming distributors ("MVPDs") still do not have full and fair access to cable programming. Further, in the wake of increased cable MSO consolidation and adverse Commission precedent, MVPDs are now at even greater risk of losing access to regional sports and other popular cable *and* broadcast networks that are staples of television viewing for video consumers. Likewise, AT&T's proposed acquisition of MediaOne and the contemporaneous linkage of cable television systems via fiber will only worsen the problem and deny consumers access to increased video choice, unless the Commission adopts additional regulatory safeguards.

BellSouth is concerned about recent Commission decisions that would appear to legitimize certain types of anticompetitive cable programmer behavior. It appears that the Commission is now of the view that it lacks authority to police the terrestrial distribution and vertical integration abuses, and that the program access problem cannot be resolved unless Congress amends the statute so that it applies to all programming, regardless of how it is owned or how it is delivered to subscribers. Even if this view was correct (and BellSouth continues to believe it is not), it cannot be reconciled with the Commission's overriding mandate to protect the interests of consumers by promoting a fully competitive market for multichannel video programming services. Whether making recommendations to Congress and/or taking carefully targeted regulatory actions as suggested herein, the Commission can and should take proactive measures to stop the gradual and deliberate deterioration of the program access environment for cable's competitors and, thereby, give full effect to the pro-competitive policies that lie at the heart of the 1992 Cable Act. In a similar vein, and for reasons discussed herein, BellSouth urges the Commission to resolve long-standing ambiguities in its "access to premises" rules to provide alternative MVPDs some badly needed regulatory clarity in the multiple dwelling unit environment.

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BellSouth Corporation and its subsidiaries, BellSouth Interactive Media Services, Inc. and BellSouth Wireless Cable, Inc. (hereinafter referred to collectively as "BellSouth"), by their attorneys, hereby file their comments with respect to the FCC's *Notice of Inquiry* (the "*NOI*") in the above-captioned proceeding.[1]

I. INTRODUCTION AND SUMMARY

BellSouth is pleased to report that it continues to make steady progress towards Chairman Kennard's goal of creating *bona fide* competition in markets for delivery of video programming.[2] BellSouth currently holds 21 franchises to provide cable "overbuild" service

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[1] FCC 99-148 (rel. June 23, 1999).

[2] *See* Separate Statement of Chairman William E. Kennard re: *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 13 FCC Rcd 1034, 1238 (1998) (the "*1998 Annual Report*").

in local markets throughout its telephone service area, representing approximately 1.4 million potential households. BellSouth has already launched cable overbuild service in Vestavia Hills, Alabama; Chamblee, Cherokee County, DeKalb County, Duluth, Gwinnett County, Lawrenceville, and Woodstock, Georgia; St. Johns County, Dade County and Pembroke Pines, Florida; and Daniel Island, South Carolina. In addition, BellSouth is negotiating to obtain cable franchises to serve additional communities in and around major metropolitan areas throughout the Southeast.

BellSouth also holds Multipoint Distribution Service ("MDS") and Instructional Television Fixed Service ("ITFS") channel rights covering approximately 3.5 million homes in several large markets in Florida, and in Atlanta, New Orleans and Louisville. The company has already launched digital wireless cable service in New Orleans, Atlanta and Orlando, and soon will launch similar service in Jacksonville and Daytona Beach.[3/] In Atlanta, for example, BellSouth's wireless system offers 160 channels (including 30 audio channels) of digital service in direct competition with cable multiple system operators ("MSOs"), MediaOne Group, Time Warner and Comcast.[4/] To date, BellSouth has invested hundreds of millions of dollars to

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[3/] BellSouth operates analog wireless cable systems in Louisville, Kentucky, Ft. Myers and Lakeland, Florida. BellSouth also holds the MDS/ITFS channel rights to serve Miami, Florida.

[4/] *See* "Wireless Crossroads: Digital, Data and Telephony," *Cable World*, at 93 (June 29, 1998); Schofield, "Rolling Out Digital Wireless Cable," *Wireless Voice Video Data*, at 27 (May/June, 1998). The service includes local broadcast stations plus basic and premium cable networks. Pay-per-view movies are offered on a near video-on-demand basis through BellSouth's Express Cinema service. Express Cinema delivers 50 near video-on-demand channels, which can be ordered from an interactive on-screen-guide. Movies typically cost $3.99 each.

acquire wireless cable channel rights, deploy transmission and reception equipment, establish the operational infrastructure necessary to develop competitive digital wired and wireless cable systems, and provide distance learning facilities and opportunities for local ITFS licensees.

Despite this level of commitment and expertise, BellSouth's ability to compete on equal footing with incumbent cable operators continues to be compromised by regulatory interpretations that work to the decided advantage of incumbent cable operators and their customers. This is inconsistent with the policies Congress has charged the Commission to implement. Contrary to what Congress intended when it enacted the Cable Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"), BellSouth and other multichannel video programming distributors ("MVPDs") still do not have full and fair access to cable programming and, in the wake of increased cable MSO consolidation and adverse Commission precedent, are now at even greater risk of losing access to regional sports and other popular cable *and* broadcast networks that are staples of television viewing for consumers. For the reasons set forth below, without additional regulatory safeguards, AT&T's proposed acquisition of MediaOne and the contemporaneous linkage of cable television systems via fiber will only worsen the problem and deny consumers access to increased video choice.

By all appearances, the Commission is now of the view that the terrestrial distribution and vertical integration loopholes in Section 628 of the 1992 Cable Act irrevocably limit its authority to police anticompetitive programmer behavior, and that the program access problem cannot be resolved unless Congress amends the statute so that it applies to all programming, regardless of how it is owned or how it is delivered to subscribers. Even if this view was correct (and

BellSouth continues to believe it is not), it cannot be reconciled with the Commission's overriding mandate to protect the interests of consumers by promoting a fully competitive market for multichannel video programming services. Whether making recommendations to Congress and/or taking carefully targeted regulatory actions as suggested below, the Commission can and should take proactive measures to stop the gradual and deliberate deterioration of the program access environment for cable's competitors and, thereby, give full effect to the pro-competitive policies that lie at the heart of Section 628. In a similar vein, and for reasons discussed herein, BellSouth urges the Commission to resolve long-standing ambiguities in its "access to premises" rules to provide alternative MVPDs some badly needed regulatory clarity in the multiple dwelling unit ("MDU") environment.

II. DISCUSSION.

A. Alternative MVPDs Remain at Risk of Losing Access to Critical Cable and Broadcast Network Programming.

1. The Ongoing Consolidation of the Major Cable MSOs Undercuts the Ability of Cable's Competitors to Acquire Programming on Nondiscriminatory Terms and Conditions.

At the outset, it must be emphasized that despite recent changes within the wireless cable industry, not *all* wireless cable operators have abandoned multichannel video service to offer only voice, high-speed Internet access or other non-video services over MDS and ITFS spectrum.[5] As discussed above, multichannel video is the "core" service offered by BellSouth's wired and wireless cable systems in all of BellSouth's markets. Thus, program access, MDU

[5] *See NOI* at ¶ 11(c).

rules and other regulatory matters that directly affect alternative MVPDs continue to be of paramount importance to BellSouth and its customers. The mere fact that some wireless cable operators may now offer two-way, non-video services in no way diminishes the relevance of those issues to BellSouth and other wireless cable operators who continue to provide video consumers with a competitive choice.[6]

As already observed by Chairman Kennard, the Commission's analysis of the program access problem "should focus on the source of any market power involved (the absence of competition at the local distribution level)."[7] Indeed, the Commission has long recognized that concentration of ownership among cable operators is significant in the program access context because it increases the buying power of the major cable MSOs and facilitates their ability to coordinate their conduct.[8] Thus, it is critical to note that consolidation within the cable industry

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[6] Indeed, recent trends in the marketplace reflect that wireless cable operators intend to offer both video and non-video services in order to compete effectively with AT&T and other cable MSOs who will offer those services in "bundles" that are tailored and priced according to the specific needs of each customer. *See, e.g.*, "MCIW's Wireless Cable Plans Cover Wholesaling, Small Business," *Communications Daily*, at 2 (July 14, 1999) (noting that MCI's wireless cable strategy includes continuing service to video customers, including those using analog technology); Hogan, "Desert High-Speed Data Duel," *Multichannel News*, at 10 (Sept. 7, 1998) (discussing MMDS operator People's Choice TV Corp.'s high-speed Internet access and digital video services in the Phoenix market).

[7] Letter from Chairman William E. Kennard to the Honorable W.L. (Billy) Tauzin, Responses to Questions at 3 (emphasis added) (Jan. 23, 1998) (the "Kennard Letter").

[8] *Implementation of Section 302 of the Telecommunications Act of 1996 - Open Video Systems*, 11 FCC Rcd 18223, 18322 (1996). *See also Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming (1998 Annual Report)*, 13 FCC Rcd 24284, 24362 (1998) ("Although cable operators usually do not compete to serve the same subscribers in local downstream markets, they may have an incentive to coordinate their decisions

(continued...)

is accelerating at an unprecedented pace and will increase even further should the Commission permit AT&T to acquire MediaOne in the wake of its recent acquisition of Tele-Communications, Inc. ("TCI"). It has been estimated that AT&T's common ownership of MediaOne and TCI will give AT&T ownership interests in cable systems serving approximately *60%* of all households in the United States.[9] Other MSOs have also intensified their efforts to consolidate with each other, and as a result, it is estimated that the top seven MSOs now serve over 54.1 million subscribers (*i.e.*, 82% of all cable subcribers in the United States) and pass 87.1 million homes (*i.e.*, 92% of all homes passed).[10]

Equally significant is the continuing trend towards "clustering" of cable television systems, a process which only tightens the cable MSOs' stranglehold over distribution of video programming in local markets.[11] The Commission's most recent statistics on clustering, which

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[8] (...continued)
in the upstream market for the purchase of programming on a national or regional level. Concentration of ownership among buyers in this market is one indicator of the likelihood that coordinated behavior among buyers will be successful.").

[9] *See* Statement of Senator Mike DeWine re: Joint Hearing of Senate Judiciary Committee and Antitrust, Business Rights and Competition Subcommittee, "Broadband: Competition and Consumer Choice in High-Speed Internet Services and Technologies" (July 14, 1999) (the "DeWine Statement"); Blumenstein and Cauley, "As Worlds Collide, AT&T Grabs a Power Seat," *Wall Street Journal*, p. B1 (May 6, 1999).

[10] "Yankee Group Demands a Recount - Report Says Cable Industry Figures Don't Add Up," *PR Newswire* (June 11, 1999). *See also* Dugan, "AT&T Chief's $120 Billion Plan Capped by Deal for MediaOne," *The Washington Post*, p. E1 (May 6, 1999) (noting that Comcast's recent agreement with AT&T will eventually provide it with access to eight million subscribers); Mifflin, "Cox to Acquire TCA Cable for $3.26 Billion," *The New York Times*, p. C1 (May 13, 1999); "Paul Allen's Charter Acquires Two More MSOs," *MediaWeek* (May 31, 1999).

[11] *See 1998 Annual Report*, 13 FCC Rcd at 24363 ("[W]e find that downstream local
(continued...)

are woefully out of date, reflect that as of the end of 1997, a total of 34.4 million subscribers (*i.e.*, more than half of all cable subscribers in the United States) are already served by system clusters,[12] and all indications are that system clustering will continue in full force as cable MSOs regionalize their operations to achieve economies of scale.[13] By way of example, Comcast has recently initiated or completed transactions that will give it control -- or the option to control -- all but one of the cable systems in the Washington, D.C. metropolitan area, plus the cable system serving nearby Baltimore, Maryland.[14] Not coincidentally, the large cable MSOs have asked the Commission to liberalize both its cable ownership attribution rules and its horizontal ownership "cap," so that MSOs may continue to aggressively pursue their clustering strategies

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[11] (...continued)
markets for the delivery of video programming remain highly concentrated. . .[A]s of June 1998, the shares of the market participants, grouped by competing technologies, would be roughly: cable, 85.3%; DBS/HSD, 12.1%; wireless cable, 1.3%; and SMATV, 1.2%.").

[12] *1998 Annual Report*, 13 FCC Rcd at 24421 (Table C-2).

[13] *See* Leibovich, "Comcast to Control Area Cable," *The Washington Post*, pp. E1, E10 (May 6, 1999) ("Cable firms have for many years moved to consolidate their holdings into regional pockets, or 'clusters' of systems. . . Unlike the highly balkanized cable industry of the past, operators in recent years have swapped or sold their holdings to assemble these large groups; the idea is to lower the overall cost of administration, marketing, billing and equipment purchases by placing them under one central office.").

[14] *Id. See also 1998 Annual Report*, 13 FCC Rcd at 24372 ("Since September 1997, TCI has announced a number of swaps and acquisitions through which it has gained control of the systems previously owned by Time Warner, MediaOne, Jones, and Multimedia that would allow TCI to control more than 90% of the Chicago metropolitan market"); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming (1997 Annual Report)*, 13 FCC Rcd 1034, 1117 (1998) (discussing TCI's sale of 10 cable systems serving 820,000 subscribers in the New York ADI to Cablevision Systems Corp. ("Cablevision"), creating a cluster of 2.5 million subscribers, and TCI's transactions with Falcon Cable and Adelphia Communications, the latter of which will create a major cluster in Pennsylvania, New York and Ohio serving 466,000 subscribers.). *Id.*

without running afoul of the Commission's horizontal ownership limitations for cable television system operators.[15]

The marketplace developments described above will have a substantial and irreparable chilling effect on the willingness of programmers to sell their product to cable's competitors. It is beyond debate that a programming service has no chance of success without access to a critical mass of subscribers, and that programmers, therefore, are becoming even more beholden to the large MSOs as AT&T and others tighten their control over distribution on a national and regional scale. As noted with respect to Time Warner's acquisition of Turner Broadcasting:

> The launch of a new channel that could achieve marquee status would be almost impossible without distribution on either the Time Warner or TCI cable systems. Because of the economies of scale involved, the successful launch of any significant new channel usually requires distribution on MVPDs that cover 40%-60% of subscribers . . . TCI and Time Warner are the two largest MVPDs in the U.S. with market shares of 26.7% and 17%, respectively. Carriage on one or both systems is critical for new programming to achieve competitive viability.[16]

The above-quoted observation is no less true of the television broadcast networks, who are entirely beholden to cable MSOs for carriage of network-affiliated cable programming

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[15] *See, e.g.,* Comments of Cablevision Systems Corporation, CS Docket No. 98-82 and MM Docket No. 92-264, at 5-6 (filed Aug. 14, 1998); Comments of Tele-Communications, Inc., CS Docket No. 98-82, at 19-24 (filed Aug. 14, 1998) (the "TCI Comments"); Comments of Adelphia Communications Corporation, *et al.*, CS Docket No. 98-82 and MM Docket No. 92-264, at 4-7 (filed Aug. 14, 1998); Comments of Time Warner Inc., CS Docket No. 98-82 and MM Docket No. 92-264, at 32-38 (filed August 14, 1998).

[16] Separate Statement of Chairman Pitofsky and Commissioners Steiger and Varney, *In the Matter of Time Warner Inc.*, FTC File No. 961-0004, at 7-8 (Sept. 12, 1996). Against this backdrop, it is important to note that the principal beneficiary of any liberalization of the Commission's horizontal ownership rules would be AT&T, which, through TCI, is seeking nonattribution of numerous minority ownership interests TCI holds in joint ventures with other cable MSOs throughout the United States. *See* TCI Comments at 41-50.

services (*e.g.*, MSNBC, CNBC, Fox News, FX, ESPN/ESPN2) and, ultimately, digital television ("DTV") signals. Whereas television broadcast networks once had opportunities to sell their programming to multiple cable operators in a region, now they are increasingly forced to deal with a single cable operator who controls the lion's share of the market's subscribers. As noted by the Association of Maximum Service Television, Inc. ("MSTV"):

> Cable operators remain vertically integrated and are becoming more horizontally integrated. They control the gateway to almost 70% of American television households and increasingly make significant inroads into local advertising markets. As a result of all these factors, they have strong incentives to exclude or disadvantage local television signals that compete for advertising, particularly when these signals might be of higher technical quality.[17]

As a result, it is no surprise that incumbent cable operators repeatedly demand and receive exclusivity from broadcast networks as a *quid pro quo* for carriage of their owned or affiliated non-broadcast programming services.[18] For instance, it is well known that NBC and Fox have surrendered exclusivity to the MSOs for MSNBC and Fox News Channel, respectively, to secure carriage of their broadcast programming on cable systems throughout the United States.[19] The Commission's rule that prohibits exclusive retransmission consent agreements

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[17] Comments of the Association of Maximum Service Television, Inc., CS Docket No. 98-120, at 16 (filed Oct. 13, 1998).

[18] "Raising the Exclusivity Ante," *Cable World*, at 1, 103 (July 15, 1996). As identified by the Commission, cable-exclusive services currently include Game Show Network, Home & Garden Television, TV Land, and, as discussed *infra*, MSNBC and Fox News. Kennard Letter, Responses to Questions at 1.

[19] *See, e.g.*, "Continental, Comcast to Pick Up Fox News," *Media Daily* (Sept. 25, 1996); "NBC's Wright Says Fox-Time Warner News Deal Imminent," *Media Daily* (July 15, 1996); Flint, "Fox Unveils FX Schedule," *Broadcasting & Cable*, at 20 (Dec. 6, 1993); "Oct. 6 Retransmission (continued...)

(Section 76.64(m)) does not explicitly ban these types of arrangements, nor perhaps more significantly,does it prevent incumbent cable operators from achieving *de facto* exclusivity for broadcast programming by requiring broadcasters to offer competing providers retransmission consent on unreasonable terms and conditions not required of the cable operator itself — terms that are deliberately designed to discourage carriage and, thus, competition.[20/]

Furthermore, the Commission has acknowledged elsewhere that increased system clustering facilitates expanded linkage of cable television systems via fiber, which in turn provides cable programmers with unprecedented opportunities to evade their program access obligations by migrating programming from satellite to fiber delivery.[21/] The Commission must

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[19/] (...continued)
Consent Disruptions Minimized by Agreements," *Communications Daily*, at 1 (Oct. 6, 1993); "TCI Defends Exclusive Carriage Deals to Senate," *Media Daily* (Oct. 13, 1997); Testimony of Matthew Oristano, Chairman, People's Choice TV Corp., before the Federal Communications Commission re: Status of Competition in the Multichannel Video Industry, at 6 (Dec. 18, 1997) ("[T]here are today alliances between cable and broadcast TV (NBC, Fox, CBS) which create exclusivity, and cable and satellite programmers (Murdoch) which create exclusivity, and cable and former cable operators (Viacom) which create exclusivity. The cable industry control of programming, if diagramed with all of its equity, licensing, carriage agreements, and *quid pro quo* relationships, creates a web which has the effect of ensnaring all competitors.").

[20/] Such unreasonable terms include, for example, requiring a competing provider to carry the broadcaster's primary signal *and* all of the broadcaster's cable networks and new digital broadcast services as a precondition for obtaining retransmission consent.

[21/] *See, e.g.,* Kennard Letter, Response to Questions at 6 ("Programming that is used by a single system or group of interconnected systems is typically distributed terrestrially. . .[T]here . . has been a trend toward a greater linkage of cable systems in regional clusters through fiber optic connections which are now much more generally available. These facilities, once in place, would typically have the capacity to distribute a number of channels of service.").

be aware that the AT&T/TCI merger only guarantees that significant amounts of critical cable programming will be migrated to fiber delivery:

> We recognize, . . ., that the integration of TCI's content with AT&T's coast-to-coast fiber optic network may provide the merged entity with the ability and the cost and quality incentives to migrate video programming from satellite to terrestrial delivery. Such a migration could have a substantial impact on the ability of alternative MVPDs to compete in the marketplace. . . [W]e remain aware of the potential for this type of migration and the possible need to address it in the future.[22/]

The Commission's observation is particularly relevant in the Atlanta market, where BellSouth competes head-to-head with MediaOne for video, voice and high-speed Internet access subscribers. MediaOne currently is engaged in an extensive network upgrade of its Atlanta cluster (encompassing approximately 900,000 households passed), and has commenced similar upgrades in other large metropolitan areas, including Boston, Los Angeles, Minneapolis/St. Paul, Detroit and Miami.[23/] Should the Commission approve AT&T's acquisition of MediaOne without imposing explicit program access conditions, AT&T would have both the facilities and the incentive to migrate critical programming to MediaOne's regional networks and thereby provide cable programmers an easy means to evade the rules and avoid selling their product to cable's competitors.[24/] Since cable MSOs with close business ties to

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[22/] *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee*, 15 CR 29, ¶ 37 (1999).

[23/] *See, e.g.*, Weinschenk, "AT&T's Alone in the Crowd - - Possible Concerns Over Joint Ventures Prompt Carrier's MediaOne Bid," *Tele.com* (May 3, 1999).

[24/] AT&T is one of only four domestic long-distance carriers that currently possesses a coast-

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AT&T are *already* migrating programming to fiber delivery and refusing to sell that programming to cable's competitors, BellSouth's concerns about this matter are hardly speculative.[25]

In addition, the rapid consolidation of the cable industry will only further aggravate the competitive imbalance created by the steep volume discounts which cable programmers offer exclusively to large MSOs.[26] While such discounts might represent a legitimate business strategy in a fully competitive environment in the present environment, they are available *only* to cable MSOs *that do not compete with each other.* Moreover, under the current program access law, such discounts do not have to be entirely cost-justified, and may instead be justified

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[24] (...continued)
to-coast fiber optic network. *Teleport Communications Group, Inc.*, CC Docket No. 98-24, FCC 98-169, at ¶28 (rel. July 23, 1998). As described in the various AT&T/TCI license transfer applications, AT&T's entry into the market for local residential telephone service will be achieved by integrating AT&T's network facilities with cable television systems in regional and local markets. *See, e.g.*, AT&T/TCI Submission at 21 ("AT&T and TCI anticipate combining their assets to invest in and develop advanced wireline facilities that will compete directly with ILECS to provide toll-quality voice and high-speed data communications to America's homes. . . AT&T contributes its experience in providing toll-quality voice and data traffic, switching technology, a brand name that can compete with incumbent local telephone companies and capital to cover the significant costs of the upgrade of TCI's facilities to provide for two-way voice telephony.").

[25] *See DirecTV, Inc. v. Comcast Corporation et al.*, 13 FCC Rcd 21822 (CSB, 1998) (migration of Philadelphia sports programming to fiber-delivered Comcast SportsNet); *RCN Telecom Services of New York, Inc. v. Cablevision Systems Corporation, et al.*, File No. CSR-5404-P (filed May 7, 1999) (migration of New York sports programming to fiber delivery).

[26] *See, e.g.*, Comments of BellSouth Corporation *et al.*, CS Docket No. 98-102, at 14 (filed July 31, 1998); Comments of the Small Cable Business Association, CS Docket No. 97-248, at 2 (filed Feb. 2, 1998) (noting that a small, independent operator typically pays 50% to 100% more for programming than large cable MSOs, and that even the small cable buying group (the National Cable Television Cooperative) pays up to 40% more for programming than TCI or Time Warner).

on the basis of undefined "direct and legitimate economic benefits."[27] The Commission should not be surprised when it learns that the anticompetitive effects of such discounts will become even more severe as the top few cable MSOs accumulate even more subscribers and in turn demand even higher volume discounts from cable programmers.

Finally, the ongoing consolidation of the cable industry highlights the fact that large cable MSOs continue to be horizontally *and* vertically integrated, thus reinforcing the need for rigorous enforcement of the program access law. As noted in a recent report by the General Accounting Office ("GAO") on the state of competition to cable:

> The largest cable companies have ownership interest in subscription networks, which create vertical ownership ties in the industry. In 1998, the FCC reported that 95 of 245 subscription networks were vertically integrated with some minimum ownership interest by at least one cable operator. Cable companies, either individually or collectively owned 50 percent or more of 78 subscription networks. Moreover, cable companies' ownership interests in programming included 29 of the top 50 most popular subscription networks.[28]

By the same token, however, BellSouth's experience in the marketplace confirms that *non*vertically integrated cable networks have the same economic incentives to placate cable MSOs by refusing to sell programming to alternative MVPDs.[29] Indeed, to this day BellSouth

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[27] 47 U.S.C. § 548(c)(2)(B)(iii).

[28] "The Changing Status of Competition to Cable Television," General Accounting Office, GAO/RCED-99-150, at 16 (rel. July 14, 1999). Attached hereto as Exhibit 1 is an excerpt from the GAO report outlining the specific ownership interests held by the cable MSOs in some of the more popular cable networks.

[29] *See, e.g., Dakota Telecom, Inc. v. CBS Broadcasting, Inc.*, DA 99-1276 (CSB, rel. July 1, 1999) (upholding refusal of nonvertically integrated Midwest Sportschannel to sell to competing MVPD).

does not have access to services such as MSNBC, Fox News, TV Land and the Game Show Network, all of which allegedly do not qualify as "vertically integrated" under the Commission's current definition of that term. The Commission's *1998 Annual Report* in fact reflects that fewer than half of the cable networks in operation today are "vertically integrated" and, therefore, are not covered by the program access law. These facts merely reaffirm what alternative MVPDs have known for some time, *i.e.*, that the statute's vertical integration requirement has become outdated and no longer serves its original objective of ensuring that cable's competitors are afforded nondiscriminatory access to programming.

2. *Recent Commission Precedent Has Compounded the Program Access Problem By Legitimizing Anticompetitive Programmer Behavior*

The Commission has observed in the program access context that Congress, through the 1992 Cable Act, intended to "rely on the marketplace, to the maximum extent possible, to achieve the availability of a diversity of views and information through cable television and other video distribution media."[30] BellSouth does not disagree that, in a fully competitive environment, the marketplace is the best regulator of private business transactions between alternative MVPDs and program suppliers. Absent competition, however, the marketplace cannot be relied upon to discourage cable programmers from discriminating against new entrants. It is for this very reason that Congress charged the Commission with the responsibility of adopting and enforcing program access rules to "ensure that cable television operators do not

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[30] *EchoStar Communications Corporation v. Fox/Liberty Networks LLC, et al.*, DA 99-1271, at ¶ 15 (rel. June 30, 1999).

have undue market power *vis-a-vis* video programmers and consumers."[31] Recent Commission precedent, however, suggests that the Commission has ignored this mandate and instead has adopted an extremely limited view of its jurisdiction that has led to *increasing* cable's market power at the expense of full and fair competition in the market for multichannel video services.

Of greatest concern to BellSouth is the Commission's current "hands off" policy with respect to migration of programming from satellite to terrestrial delivery. In refusing to sanction Comcast's migration of Philadelphia sports programming to the terrestrially-delivered Comcast SportsNet, the Commission stated:

> Congress did not prohibit cable operators from delivering any particular type of service terrestrially, did not prohibit cable operators from moving any particular service from satellite to terrestrial delivery, and did not provide that program access obligations remain with a programming service that has been so moved. Thus, given our prior finding that Comcast's actions do not amount to an attempt to evade our rules, we decline to find that Comcast's decision to deliver Comcast SportsNet terrestrially and to deny that programming to DirecTV is "unfair" under Section 628(b).[32]

In effect, what the Commission appears to be saying here is that it will do nothing to stop programmers from avoiding their program access obligations via terrestrial migration unless an alternative MVPD presents persuasive evidence of evasive intent. That evidence, however, is available only through discovery, which remains entirely within the Commission's discretion and is rarely granted in program access cases. Furthermore, since it is relatively easy for a cable programmer to demonstrate that fiber is a cost-efficient means of delivering programming, as

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[31] 1992 Cable Act, § 2(b)(5).

[32] *DirecTV, Inc.*, n. 25 *supra*, at ¶ 32.

a practical matter, a programmer will have little difficulty camouflaging evasive intent under the cloak of economic necessity, particularly where the Commission refuses to allow for discovery of the underlying evidence. Thus, while parties may disagree as to the scope of the Commission's jurisdiction under Section 628, there can be no denying that the Commission's decision in the DirecTV/Comcast SportsNet case gives cable programmers a road map for avoiding their program access obligations via terrestrial migration.[33]

BellSouth urges the Commission to remember that in the program access arena, and particularly where professional sports programming is concerned, there is no such thing as a *de minimis* migration of programming to fiber delivery. Under the Commission's analysis in the DirecTV/Comcast SportsNet case, conceivably the migration of *any* amount of programming would not be actionable under the program access law where a programmer can present a plausible economic justification for fiber delivery. If that is truly the precedent the Commission intended to establish, then the Commission can expect that cable programmers will continue to test the limits of the Commission's terrestrial migration policy at the expense of alternative MVPDs and their customers. This sort of regulation by attrition clearly violates the congressional intent underlying the program access provisions of the 1992 Cable Act. Indeed,

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[33] Any doubts as to the prospective impact of the DirecTV/Comcast SportsNet decision are dispelled by the recent terrestrial migration complaint filed by RCN against Cablevision Systems Corporation with respect to Cablevision's movement of certain New York professional sports programming to its terrestrially-delivered MSG Metro. *See* n.25 *supra*. In its answer to RCN's complaint, Cablevision repeatedly cites the DirecTV/Comcast case as supporting authority for its refusal to sell the sports programming at issue to RCN. *See* Answer of Cablevision Systems Corporation re: File No. CSR-5404-P, at 14-15, 23-30 (filed June 4, 1999).

the absence of a specific statutory prohibition on evasions of the program access rules through terrestrial migration is simply attributable to Congress' inability in 1992 to foresee this tactic. For these reasons, BellSouth urges the Commission to reevaluate its position and seek Congress' guidance on terrestrial migration in its Sixth Annual Report.

3. Recommendations.

Recent developments reflect that Congress is keenly aware of the close relationship between cable's market power and the inability of alternative MVPDs to obtain full and fair access to programming:

> Beyond the obvious concentration concerns raised by such a large market share, we need to look closely at the level of cross-ownership in the industry. Many of the cable systems have a share in each other, and are vertically integrated to include programming holdings. . . [I]t seems possible that AT&T might be able to skew the market if it decided to favor programming in which it had an ownership interest. This is a troubling notion, which needs to be explored.[34]

BellSouth submits that the Commission's mandate to promote competition and protect the best interests of consumers requires that the agency assume an active role in this process, both in its internal deliberations on the AT&T/MediaOne transaction and in any related legislative activity.[35] Consistent with that mandate, BellSouth urges the Commission to do the following:

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[34] DeWine Statement, n.9 *supra*.

[35] *See, e.g.*, H.R. Conf. Rep. 102-862, 102d Cong., 2d Sess., at 93 (1992) ("[T]he conferees expect the Commission to address and resolve the problems of unreasonable cable industry practices, including restricting the availability of programming and charging discriminatory prices to non-cable technologies. The conferees intend that the Commission shall encourage arrangements which promote the development of new technologies providing facilities-based competition to cable and extending programming to areas not served by cable.").

- condition any approval of the AT&T/MediaOne transaction on an explicit and irrevocable commitment from AT&T that all AT&T-affiliated programming (including that which is migrated from satellite to terrestrial delivery) will continue to be available to alternative MVPDs on nondiscriminatory terms and conditions;

- recommend to Congress that it eliminate the vertical integration and terrestrial delivery loopholes in Section 628 of the 1992 Cable Act, so that the program access law applies to all cable and broadcast programming, regardless of how it is owned or delivered to subscribers;

- recommend that Congress include in the final version of any DBS "local into local" legislation the language in Section 325(b)(3)(C)(ii) of H.R. 1554, which requires the Commission to adopt rules that prohibit broadcast stations from engaging in "discriminatory practices, understandings, arrangements, and activities, including exclusive contracts for carriage, that prevent a multichannel video program distributor from obtaining retransmission consent from such stations." Further, to ensure that new video entrants are not forced to enter into discriminatory retransmission consent agreements, the Commission should urge Congress to clarify that "discriminatory practices" include non-optional tying and bundling arrangements *vis-a-vis* network-affiliated cable programming services and DTV signals. Finally, because such discriminatory practices add cost and use channel capacity inefficiently, the conference agreement should explain that the terms *"prevent"* and *"hinder significantly,"* as used in Section 628 of the Cable Act and Section 76.1001 of the Commission's Rules, are meant to be interchangeable in the same way. Without this addition, discriminatory practices are likely to continue, with the exception of outright refusals to provide retransmission consent; and

- Attack the volume discount problem in Section 628 either by requiring strict justification of volume discounts and narrowing its interpretation of what qualifies as "other direct and legitimate economic benefits" under Section 628(c)(2)(B)(iii), or by asking Congress to clarify that this language is intended to require programming vendors to cost-justify any volume discounts where they are made available only to the largest cable MSOs that do not compete with each other.

B. The Commission Should Resolve Long-Standing Ambiguities in its "Access to Premises" Rules to Provide Alternative MVPDs Greater Certainty in the MDU Environment.

BellSouth applauds the Commission's commitment to improve the competitive environment for alternative MVPDs in multiple dwelling units, and generally believes that the Commission's "home run" wiring rules represent an important first step in that direction.[36] By the same token, however, a number of critical issues remain unresolved or under reconsideration in that proceeding, including the extent to which exclusive contracts will be permitted in the MDU environment; whether the Commission will take any action to eliminate the anticompetitive effects of perpetual contracts between incumbent cable operators and property owners; and whether the Commission will preempt discriminatory state mandatory access statutes that give incumbent cable operators, but not their competitors, a right to enter MDU property without the property owner's consent. These issues bear directly on whether alternative MVPDs will have an opportunity to compete on reasonable and nondiscriminatory terms with the large cable MSOs. Thus, it is essential that the Commission clarify its position on these items in the near term to eliminate any outstanding ambiguities as to the "rules of the road" in the MDU environment.

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[36] *See Telecommunications Services Inside Wiring, Customer Premises Equipment, Implementation of the Consumer Protection and Competition Act of 1992: Cable Home Wiring*, 13 FCC Rcd 3659 (1997) (the "*Inside Wiring Order*").

III. CONCLUSION.

Just over one year ago, Chairman Kennard made the following statement to Congress:

> [L]et's not lose sight of the fact that competition is emerging. We're seeing phone companies retool and redesign their networks to deliver sufficient broadband capability to meet the needs of the digital marketplace. At the same time, cable companies are doing much the same in a race to see which industry can deliver an affordable product to the market. There really was a vision underlying the Telecommunications Act [of 1996]. And we're beginning to see it materialize.[37]

BellSouth agrees, but, as recently noted by one prominent lawmaker, "video competition is on the way, *but we are not there yet.*"[38] The fact remains that the Chairman's vision of a fully competitive marketplace will not be realized as long as the Commission continues to be constrained by an outmoded regulatory framework that defeats congressional intent and the best interests of consumers. The Commission's ongoing efforts to promote competition prove that consumers are best served by direct and immediate action on the issues raised above. BellSouth

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[37] Statement of Chairman William E. Kennard before the United States Senate Subcommittee on Communications, Committee on Commerce, Science and Transportation, on the Preauthorization of the Federal Communications Commission, 1998 FCC LEXIS 2760, at *11 (June 10, 1998).

[38] DeWine Statement, n. 9 *supra* (emphasis added).

thus urges the Commission to stay its pro-competitive course and take whatever steps are necessary to effectuate the rule modifications and legislative reforms recommended herein.

Respectfully submitted,

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August 6, 1999

CERTIFICATE OF SERVICE

I, Stephanie C. Sieber, hereby certify that true copies of the foregoing Comments were served this 6th day of August 1999, by ensuring the hand delivery of said Comments to the following:

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